91-1383

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

CLAYTON JOEL FLOWERS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED FOR REVIEW

1. Whether this Court should grant certiorari and overrule the holding of the Alabama Court of Criminal Appeals which decided a substantial federal question when it held that the death sentence of the Respondent should be vacated under Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals vacating the Respondent's death sentence has not yet been reported. A copy of this opinion is reproduced as Appendix A to this petition.

2. The opinion of the Alabama Court of Criminal Appeals denying the Petitioner's motion for rehearing has not yet been reported. A copy of this opinion is reproduced as Appendix B to this petition.

3. The order of the Supreme Court of Alabama denying the Petitioner's petition for writ of certiorari has not yet been reported. A copy of this order has been reproduced as Appendix C to this petition.

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STATEMENT OF JURISDICTION

Petitioner seeks review of a final decision of the Alabama Supreme Court issued on December 6, 1991, denying certiorari to the Alabama Court of Criminal Appeals' decision of July 26, 1991 vacating the Respondent's death sentence. The State has filed this petition within 90 days of that date. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VIII:

> "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

STATEMENT OF THE CASE

On February 3, 1989, the Respondent was indicted by the Grand Jury of Baldwin County, Alabama for the offense of capital murder in violation of §13A-5-40(a)(3), Code of Alabama, 1975. (R. 1198-1199) A jury trial was held on this matter on September 2, 1989. The Alabama Court of Criminal Appeals stated the following concerning the facts of this case:

> "At approximately 1:00 a.m. on the morning of June 5, 1990, Melissa Stone saw Karen Rolin at the Delchamps grocery store in Bay Minette with two young boys. Later that morning, the body of Karen Rolin was found floating under the Hollinger Creek Road bridge in Baldwin County, Alabama. A tire tool and a tire jack were found near the body. There was blood on the bridge and on the guard rail of the bridge. That same morning, the victim's car was found some distance away in Forest Park Lake.
>
> "The appellant gave two statements regarding the victim's death, the first to the Bay Minette Police Department and the second to the Baldwin County Sheriff's Department. The following is a summary of those statements. In the early morning

hours of June 5, 1990, the appellant and Bill Caraway were at Raymond White's house when the victim picked them up. The three went to Delchamps, where the victim attempted to cash her paycheck and then they got some gasoline. At this point, Caraway was driving, and he drove to Pine Grove Middle School. There, the victim said she wanted to have sex with the appellant, and they did. The appellant said the he used a condom. Afterwards, Caraway wanted to have sex with her. At this point, they all got out of the car and the appellant sat on the trunk of the car. The victim performed oral sex on the appellant while Caraway had anal intercourse with her. The appellant said that he had anal intercourse with the victim also. They then got back into the car and Caraway drove to Hollinger Creek Road bridge where Caraway got out of the car and told the appellant to get out. Caraway told the appellant that he wanted to "shut her mouth." Caraway then went and opened the trunk and told the victim to get out of the car. The appellant told Caraway that he did not want to be involved, and he got back in the car. Caraway began hitting the victim with his fists and a tire tool and then he told the appellant to get out of the car. When the appellant got out, Caraway handed him the tire tool and told him to hit the victim. The appellant threw down the tire tool. Then Caraway handed the appellant a tire jack,

and the appellant hit the victim with it one time, but he thought that she was already dead. Caraway and the appellant then dragged the victim across the bridge and threw her body into the creek. Caraway and the appellant drove to Forest Park Lake. Caraway wedged a stick against the accelerator of the victim's car, and the car went into the lake. Caraway and the appellant then went to White's house and White took him home.

"Dr. Leroy Riddick performed the autopsy on the victim's body. The autopsy revealed numerous lacerations to the head and face, multiple fractures to the skull, and defensive wounds to the arms. Dr. Riddick testified that the victim died of multiple blunt force injuries to the head and that those injuries could have been caused by a tire jack. The autopsy also revealed the presence of six tears around the anus and that semen was present in the anus. Riddick stated that the tears to the anus would have been painful.

"Forensic tests showed that blood found on the victim's car was the same type as the victim's blood. A footprint impression taken near a pool of blood on the bridge matched the shoeprint of one of the appellant's shoes. Vaginal swabs taken from the victim were negative for the presence of seminal fluid but anal swabs taken from the victim were

positive for the presence of seminal fluid. No semen was found in a condom which was found in the victim's car. Twelve of the victim's finger prints or palm prints were found on the top of the trunk of her car. Thirteen of the appellant's finger prints and palm prints were found on various places inside and outside of the victim's car. Two of the appellant's palm prints were found overlapping two of the victim's palm prints on the trunk. The palm prints of the appellant and the victim were facing different directions. The appellant's and the victim's palm prints were also found on the driver's window.

"The appellant's testimony at trial differed somewhat from his statements which were given to the police. The appellant testified that after he and the victim had had consensual sex at the Pine Grove Middle School, Caraway got in the backseat with the victim and the appellant took a walk. A while later, Caraway called him back to the car. The victim seemed upset and Caraway was mad. Caraway then drove to Hollinger Creek Road bridge where he stopped and told the appellant that he needed to talk to him outside of the car. The appellant got out of the car and Caraway opened the trunk and said "We need to make sure she don't say anything" because "she wouldn't give it to me, so I took it." The appellant replied that he "wasn't going to have no part of this." Caraway

> told the victim to get out of the car, and the appellant got. back into the car and listened to the radio. A few minutes later, Caraway told the appellant to get out of the car. When he did, the appellant saw the victim lying on the ground and saw Caraway with a tire tool in his hand. Caraway handed him the tire tool and told the appellant to hit the victim. The appellant threw it down. Caraway then handed the appellant the tire jack and said, "Hit her with this or I will hit you with it." The appellant then threw the jack down and he vomited. He doesn't remember whether he hit the victim with the jack. The appellant heard a splash and then heard the trunk close. He and Caraway got back in the car and drove to Forest Park Lake. The appellant got out of the car and started walking. He heard the sound of a motor and a splash. The appellant and Caraway then returned to White's house. (Appendix A, pages 2-5)

The jury returned a verdict of guilty as to capital murder (murder during the course of sodomy) and recommended a sentence of life imprisonment without parole.[1] (Record-1281)

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[1]The vote of the jury consisted of one (1) vote for death and eleven (11) votes for life without parole.

On February 23, 1990, the trial court conducted a sentencing hearing, at the conclusion of which the Court entered a sentence of death by electrocution. (R. 1286-1293) On July 26, 1991, the Alabama Court of Criminal Appeals vacated the death sentence of the Respondent who was fifteen (15) years of age at the time of the offense. (Appendix A) On appeal, the Respondent argued that the trial court was precluded from sentencing him to death because of his age under authority of Thompson v. Oklahoma.[2]

On August 9, 1991, the State of Alabama filed a motion for rehearing. In this motion, the Petitioner contended that Alabama's unique statutory scheme distinguished its death statute from the one present in Thompson v. Oklahoma, supra. On August 23, 1991, the Alabama Court of Criminal Appeals denied the Petitioner's application for rehearing. (Appendix B)

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[2]487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

On September 13, 1991, the State of Alabama petitioned the Alabama Supreme Court for a writ of certiorari. That petition was denied on December 6, 1991. (Appendix C)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI AND OVERRULE THE HOLDING OF THE ALABAMA COURT OF CRIMINAL APPEALS WHICH DECIDED A SUBSTANTIAL FEDERAL QUESTION WHEN IT HELD THAT UNDER ALABAMA'S STATUTORY SCHEME A FIFTEEN YEAR OLD DEFENDANT COULD NOT RECEIVE THE DEATH PENALTY UNDER THOMPSON V. OKLAHOMA, 487 U.S. 815 (1988).

This Court should grant the Petitioner's petition for writ of certiorari because the Alabama Court of Criminal Appeals has decided a substantial federal question which needs to be, but has not yet been, addressed by this Honorable Court. In this case, the Alabama Court of Criminal Appeals held that Alabama's statutory scheme does not allow the imposition of the death penalty under Thompson v. Oklahoma, 487 U.S. 815 (1988).

This Court's decision in Thompson v. Oklahoma[3] was a plurality decision. As this Court stated in Gregg v. Georgia[4] with regard to the interpretation of a plurality opinion:

> "the holding of the Court may be viewed as that position taken by those members who concurred in the judgements on the narrowest grounds."

Thus, to find the holding of this Court in Thompson, one must look to the concurring opinion of Justice O'Conner.

Although Justice O'Conner stated that she believed "that a national consensus forbidding the execution of any person for a crime committed before the age of 16 existed," she was "reluctant to adopt this conclusion as a matter of constitutional law" at that time. She further stated:

> "Because I conclude that the sentence in this case can and should be set aside on narrower

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[3]487 U.S. 815 (1988).

[4]428 U.S. 153, 169 n. 15 (1976).

> grounds than those adopted by the plurality and because the grounds on which I rest should allow us to face the more general question when better evidence is available, I concur only in the judgment of the Court."
>
> (101 L. Ed. 2d at 728).

Therefore, this decision rest on very narrow grounds.

The most pertinent portion of Justice O'Conner's opinion is as follows:

> "The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State [Oklahoma] has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility.

> Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.

Thompson, 487 U.S. at ____, 108 S. Ct. at 2711.

The essence of Justice O'Conner's ruling is the lack of an explicit minimum age expressed in the Oklahoma statute. However, she also stated that if it were clear that no national consensus forbids the imposition of capital punishment before the age of 16, the

implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. The Petitioner recognizes the difficulty in establishing that such a national concensus exist. However, the Petitioner contends that a strong case can be made that a national consensus does exist as to the appropriateness of the death penalty for crimes of such a brutal and heinious nature as was committed in this instant case, notwithstanding the fact that the perpetrator of such a crime was fifteen years old at the time of the offense.

Justice O'Conner's main concern appears to be that the failure of an explicit minimum age in the statute would indicate a considerable risk that the legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility.

The Petitioner submits that the Alabama legislative scheme weighs against this conclusion. First, the Alabama legislative scheme allows a child over the age of 14 to be tried as an adult.[5] While the Petitioner is aware that the Oklahoma and Alabama statutes are similar, it is the contention of the Petitioner that the Alabama legislature has imputed knowledge of existing statutes. Therefore, it appears to the Petitioner as follows:

1. Alabama's legislature passed its capital statute with no reference to age.

2. At the time of the passage of said legislation Alabama law provided that any child over the age of 14 could be tried as an adult.

3. The Petitioner submits, that in light of this fact the Alabama legislature was aware that the minimum age for death eligibility was 14 years of age.

4. The Petitioner submits that if the Alabama legislature had not intended capital

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[5]Title 12-15-34(a)(1), Code of Alabama (1975).

> punishment to be applied in appropriate circumstances to defendants under the age of 16, they would have expressly excluded that category.

Secondly, the Alabama statutory scheme mandates that the defendant's age is to be taken into consideration in determining whether capital punishment should be imposed.[6] The Petitioner submits that when both of these statutory elements are considered together there is no considerable risk that the legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question serious consideration.

In its opinion the Alabama Court of Criminal Appeals distinguished LeCroy v. Florida, 533 So. 2d 750, cert. denied, 109 S. Ct. 3262, cited by the District Attorney of Baldwin County, from the case at bar.

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[6]Title 13A-5-51(7), Code of Alabama (1975).

Although the Petitioner concedes that the defendant in LeCroy was 17 years of age, the Petitioner submits that an examination of LeCroy is most helpful in evaluating Alabama's statutory scheme. The Petitioner contends that the age of the defendant in LeCroy[7] is the only distinguishing element from this instant case.

The Florida Supreme court distinguished Thompson[8] on four separate grounds:

1. The age of the defendant.

2. A Florida statute provides that a child of any age indicted for a crime punishable by death or life imprisonment "shall be tried and handled in every respect as if he were an adult." LeCroy, 533 So. 2d at 758.

3. "Point two is reinforced by the Florida legislature's decision that age should be a statutory mitigating factor," and

4. The trial judge in sentencing the defendant considered his age but found him mentally and

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[7]533 So.2d 705, cert. denied, 109 S.Ct. 3362.

[8]487 U.S. 815 (1988).

> emotionally mature and this was consistent with the jury's recommendation of death.

In this present case Alabama law provides that every child over the age of 14 who is indicted for any felony shall be treated as an adult. This point is reinforced by the Alabama legislature's decision to make a defendant's age a mitigating factor under its capital statute. Finally, although the jury returned a verdict of life without parole, the trial judge considered the Appellant's age as a mitigating factor but found that the aggravating factors in the case outweighed such mitigation. Further, the State submits that the fact that the Florida statute allows a child of any age to be prosecuted in a capital case, should be evidence that there is no national consensus forbidding the imposition of the death penalty in regards to 15 year old defendants.

Lastly, the Petitioner would note the case of Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989).

Once again there is a plurality opinion. Justice O'Conner once again wrote a concurring opinion. She stated that although there was no minimum age provided in the statute, she reiterated her position that such a fact presented no constitutional problem where it was sufficiently clear that no national consensus would forbid such an application of capital punishment. She concluded that it was clear that no such national consensus existed in regard to 16 year old defendants and concurred with the judgment of the Court.

The Petitioner submits that Thompson v. Oklahoma was decided on very narrow grounds. As Justice O'Conner noted the case was not closed but deffered to "---allow us to face the more general question when better evidence is available---." Additionally, the Petitioner submits that Thompson v. Oklahoma, supra, did not take into account the total statutory scheme found in Alabama. The Petitioner contends that the concurrence of a statute providing that children over 14 may be

tried as adults and the legislative mandate that a defendant's age is a mitigating factor removes the concern expressed by Justice O'Conner regarding the Oklahoma statute.

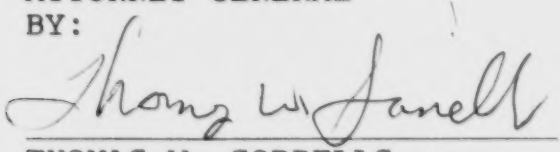
Therefore, this Honorable Court should overrule the decision of the Honorable Court of Criminal Appeals.

CONCLUSION

For the reasons stated above, this Court should grant certiorari to decide the substantial federal question presented in this case.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:



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